IN THE SUPREME COURT FOR THE STATE OF OREGON
INQUIRY CONCERNING A JUDGE

Re: The Honorable Vance D. Day, Respondent

Commission on Judicial Fitness and Disability
Nos. 12139, 1486

S063844

BRIEF OF *AMICUS CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF COMMISSION ON JUDICIAL FITNESS AND DISABILITY

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INTRODUCTION AND SUMMARY OF ARGUMENT

Judge Vance Day refused to treat same-sex couples seeking to exercise their fundamental right to marry on equal terms as different-sex couples seeking to exercise that same right. While that refusal would have been permissible if Judge Day had been acting as a member of the clergy, he was wearing a judge's robes, not a clerical collar. As a judicial officer, Judge Day was obligated by law and by oath to refrain from manifesting bias or prejudice and undermining the integrity or impartiality of the judiciary. He willfully flouted these obligations, going so far as to conscript court staff to implement a scheme to screen out same-sex couples and misrepresent that he was unavailable—as opposed to unwilling—to provide the same service that he provided to others. Neither the federal nor state constitution affords a right to screen out lesbian and gay people from access to the judiciary and its officers.

1. Although the Commission on Judicial Fitness and Disability ("Commission") has addressed multiple violations of the Oregon Code of Judicial Conduct ("Code"), this brief focuses on the count concerning Judge Day's conduct with respect to performing marriages. There is clear and convincing evidence that Judge Day willfully violated the Code, which bars the manifestation of bias or prejudice, Rule 3.3(B), as well as conduct that undermines judicial integrity or impartiality, Rule 2.1(A), among other

misconduct. As confirmed by an unbroken line of opinions from courts and ethics commissions across the country, a judge's refusal to perform marriages for same-sex couples on equal terms as for different-sex couples violates the most basic rules governing judicial conduct. Contrary to the assertion of Judge Day and *amicus curiae* Christian Legal Society, the fact that judges may refuse to perform marriages altogether does not exempt their conduct from regulation when they choose to perform that function: even where a judge is performing a discretionary judicial function, the harm of bias and prejudice to individuals, the judiciary, and society itself is all the same.

2. There is no constitutional defense that can immunize Judge Day's violation of the Code. The Code's application here does not trigger heightened scrutiny under any of the constitutional defenses asserted by Judge Day based on free speech, free exercise of religion, due process, or equal protection. An evenhanded requirement that all judges refrain from manifesting bias in the performance of their official duties does not implicate any judge's constitutional rights. Even if heightened scrutiny were appropriate here, however, the Code is narrowly tailored to serve the government's paramount interests in both nondiscrimination and judicial integrity.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Founded in 1973, Lambda Legal is the nation's oldest and largest legal

organization whose mission is to achieve full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and everyone living with HIV through impact litigation, education, and public policy.

Of particular relevance here, the issues raised in this case sit at the intersection of core areas of Lambda Legal's expertise: the right of LGBT individuals to equal treatment under the law; the extent to which a religious motivation can undermine that right to equal treatment; and the need for fair and impartial courts in achieving equal justice for LGBT individuals.

Lambda Legal has extensive experience as party counsel or *amicus curiae* in key cases affecting the rights of LGBT people. *See, e.g., Obergefell v. Hodges*, __ US __, 135 S Ct 2584, 192 L Ed 2d 609 (2015) (striking down bans on marriage for same-sex couples); *Lawrence v. Texas*, 539 US 558, 123 S Ct 2472, 156 L Ed 2d 508 (2003) (striking down sodomy laws); *Romer v. Evans*, 517 US 620, 116 S Ct 620, 134 L Ed 2d 855 (1996) (holding unconstitutional a state law forbidding legal protections for gay people); *Latta v. Otter*, 771 F3d 456 (9th Cir 2014) (invalidating ban on marriage for same-sex couples); *SmithKline Beecham Corp. v. Abbott*, 740 F3d 471 (9th Cir 2014) (holding that heightened scrutiny applies to sexual orientation-based classifications).

This experience extends to defending, as party counsel or *amicus curiae*, sexual orientation nondiscrimination protections against purported

constitutional challenges—including based on free speech and the free exercise of religion in a variety of contexts. *See, e.g.*, *Klein v. Or. Bureau of Labor and Indus.*, No A159899 (Or Ct App) (bakery); *State v. Arlene's Flowers*, 389 P3d 543, 556-60 (Wash 2017) (florist); *Gifford v. McCarthy*, 23 NYS 3d 422, 137 AD3d 30 (NY App Div 2016) (wedding venue); *Craig v. Masterpiece Cakeshop*, 370 P3d 272 (Colo App 2015), *cert filed*, No 16-111 (Jul 22, 2016) (bakery); *Cervelli v. Aloha Bed & Breakfast*, No 11-1-3103-12 ECN (Haw Cir Ct Apr 15, 2014) (bed and breakfast), *appeal docketed*, No 13-806; *N. Coast Women's Care Med. Group, Inc. v. Benitez*, 44 Cal 4th 1145, 1159, 189 P3d 959 (2008) (healthcare provider).

Lambda Legal has also dedicated resources through its Fair Courts Project to countering efforts that jeopardize the ability of our courts to make decisions based on constitutional principles, rather than politics or popular opinion, and that therefore threaten the civil rights of LGBT people and everyone living with HIV.

ARGUMENT

I. The Commission Correctly Found Clear and Convincing Evidence That Judge Day Manifested Bias and Prejudice and Undermined Judicial Integrity and Impartiality.

Judge Day violated the Code's rules prohibiting bias and conduct undermining judicial integrity, among other provisions, through his refusal to

treat on equal terms same-sex and different-sex couples seeking to marry. The Commission correctly found clear and convincing evidence for each of these violations, which is a determination that is "entitled to respect" on *de novo* review. *In re Jordan*, 290 Or 303, 307, 622 P2d 297, 300 (1981) (internal quotation marks omitted).

A. Judge Day's Discriminatory Scheme for Screening Out Same-Sex Couples Manifested Bias in Violation of Rule 3.3(B).

Judge Day's refusal to officiate marriages for same-sex couples in his capacity as a judicial officer on equal terms as for different-sex couples violated Rule 3.3(B) of the Code. That rule provides, in relevant part, that a judge shall not "manifest bias or prejudice" based on sexual orientation against parties or others in performing judicial duties and shall not permit court staff to do so.

There is little, if any, dispute regarding Judge Day's action after same-sex couples were legally permitted to marry in Oregon. Judge Day "[a]dmits that [he] requested his assistant to not schedule him to perform same sex marriages." ER 33. As his counsel explained, Judge Day instructed his staff "to find out ahead of time * * * if you can tell by names that they're same-sex couples, or look on * * * Oregon Judicial Information Network, see if you can get any information there, and simply refer them to the clerk's office." Tr 61.

He further instructed his staff to tell same-sex couples that he "wasn't available"—rather than unwilling—to perform their marriages. Tr 786.

By devising and implementing this scheme to turn away same-sex couples while continuing to perform marriages for different-sex couples, Judge Day manifested bias and prejudice based on sexual orientation. Far from preventing court staff from engaging in these actions, as required by Rule 3.3(B), he directed his staff to put the discriminatory practice into place.

None of Judge Day's arguments refute this clear and convincing evidence. First, Judge Day asserts that because performing marriages is a discretionary function, it is exempt from the Code. That is incorrect. Although judges are not *required* to perform marriages, they are authorized to do so only because of their position as judges. ORS 106.120. When Judge Day chose to undertake performing marriages as a judge, he was performing a judicial duty; the fact that it was discretionary does not erase its judicial character. Discretion about whether to perform marriages does not exempt judges from the obligation that they not manifest bias if they do choose to perform marriages.

Indeed, courts and judicial ethics commissions across the country have uniformly concluded that a judge's refusal to perform marriages only for same-sex couples violates judicial codes of conduct. *See, e.g.*, *Neely*, 390 P3d 728, 749 (Wyo 2017) (rejecting notion that a judge is exempt from the requirement

of impartiality merely because performing marriages is discretionary); Ohio Bd of Prof'l Conduct Op 2015-1, 2015 WL 4875137 *1 (2015) (concluding that, regardless of whether performing marriages is discretionary, a judge may not refuse to perform marriages only for same-sex couples); Ariz Sup Ct Jud Ethics Advisory Comm Op 15-01, 2015 WL 1530659, at *1 (2015) ("a judge who chooses to perform marriages may not discriminate" between same-sex and different-sex couples).[1] Not a single case cited by Judge Day nor *amicus curiae* Christian Legal Society holds that a judge may manifest bias or prejudice when performing a discretionary judicial function. A judge may refuse to perform marriages—but simply not on a prohibited basis.

Second, Judge Day argues that no same-sex couple was turned away because of his objection to serving them equally. But the language of Rule 3.3(B) prohibits a judge from "manifest[ing]" bias or prejudice. Judge Day "manifest[ed]" bias when he formulated a plan to refuse to perform a judicial duty for one class of people that he provided to another class of people. Regardless of whether any same-sex couple was turned away based solely on his objection to serving them, Judge Day nonetheless erected a barrier for all

[1] *See also* Wis Jud Conduct Advisory Comm Op No 15-1, 2015 WL 5928528 (2015); Neb Jud Ethics Comm Op 15-1 (June 29, 2015), *available at* https://supremecourt.nebraska.gov/sites/supremecourt.ne.gov/files/ethics/judges/15-1.pdf; Penn Jud Conduct Bd Newsletter, at 18; *In re Tabor*, Wash Jud Disp Op 7251-F-158, 2013 WL 5853965 (Wash Com Jud Cond 2013).

same-sex couples that no different-sex couples faced, which is itself an injury. *Cf. Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 US 656, 666, 113 S Ct 2297, 124 L Ed 2d 586 (1993) (recognizing a "denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit"). Judge Day also "manifest[ed]" bias by directing court staff to conduct court background checks on couples to ascertain their gender—which his staff in fact carried out on those seeking to marry, including on one suspected same-sex couple. Tr 785-86.

Third, Judge Day contends that the law regarding marriage for same-sex couples did not "actually" change until after the U.S. Supreme Court decided *Obergefell v. Hodges* on June 26, 2015. Day Br 120. That is not true. A federal district court had already invalidated and enjoined Oregon's law barring same-sex couples from marrying more than a year earlier, on May 19, 2014, which was "effective immediately." *See Geiger v. Kitzhaber*, 994 F Supp 2d 1128, 1148 (D Or 2014). There was no latitude to disregard that injunction[2] and, perhaps more importantly, there is no question that judicial officers and county clerks were *authorized* to marry same-sex couples after that point.

[2] Indeed, the Ninth Circuit and U.S. Supreme Court also denied a stay sought by a putative intervenor in the days following the order. *Geiger v. Kitzhaber*, No 14-354427, 2014 WL 2566885 (9th Cir May 19, 2014); *National Organization for Marriage v. Geiger*, 134 S Ct 2722 (US June 4, 2014).

Judge Day's refusal to treat same-sex couples equally in Oregon in 2014 cannot be defended with the *non sequitur* that there were same-sex couples in Ohio or elsewhere who could not marry until 2015.

Last, Judge Day contends that he had "no intent to outrage the public or offend same-sex couples." Day Br 121. But that is not the relevant metric. Although the Oregon Constitution requires a "willful" violation for judicial discipline, an improper motive, such as a desire to harm, is not required. *See In re Gustafson*, 305 Or 655, 660, 756 P2d 21 (1988). Instead, a judge's conduct is "willful" where the judge intends to cause a result. *In re Schenck*, 318 Or 402, 405, 870 P2d 185 (1994). Judge Day devised and implemented a scheme for the intended purpose of treating one class of people differently than another based on their sexual orientation. That is plainly "willful" conduct.

B. Judge Day's Discriminatory Scheme for Screening Out Same-Sex Couples Demonstrates a Lack of Impartiality That Undermines Judicial Integrity in Violation of Rule 2.1(A).

There is also clear and convincing evidence that Judge Day willfully violated Rule 2.1(A) of the Code, which preserves the integrity and impartiality of the judiciary. The judicial duty to administer justice without bias or favor is essential to the proper functioning of our judiciary. Public confidence in the fairness and integrity of our nation's judiciary is thus a vital state interest. *See Caperton v. A. T. Massey Coal Co.*, 556 US 868, 889, 129 S Ct 2252, 173 L Ed

2d 1208 (2009). That confidence in the courts is undermined, however, when a judge allows his or her personal or religious beliefs about the propriety of the law to affect the performance of any judicial function. Fair and impartial performance of a judicial duty demands equal application of the law to all parties and classes of people.

Judge Day's discriminatory scheme of turning away same-sex couples epitomizes the partiality squarely prohibited by Rule 2.1(A): only one class of individuals is able to access the services that Judge Day provides in marrying couples. That scheme also fosters a public perception that Judge Day is unwilling or unable to be fair and impartial towards lesbian, gay, and bisexual individuals, and that he is unwilling or unable to apply the law equally to all who come before him.

As with the Code's prohibition against bias and prejudice, the fact that performing marriages is discretionary for judges provides no defense to a violation of Rule 2.1(A). The plain language of Rule 2.1(A) mandates that judges must preserve public confidence in the judiciary "at all times."[3]

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[3] Oregon's Rule 2.1 is based upon the ABA's Model Code of Judicial Conduct, which contains an equivalent model rule with commentary noting that:

> "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public

Courts and tribunals charged with regulating judicial conduct have also uniformly recognized that a refusal to perform marriages for only same-sex couples violates rules preserving judicial integrity and impartiality. *See Neely*, 390 P3d at 749 (Wyo 2017); *In re Tabor*, 2013 WL 5853965, at *1; Ohio Bd of Prof'l Conduct Op 2015-1, 2015 WL 4875137, at *3; Wis Jud Conduct Advisory Comm Op No 15-1, 2015 WL 5928528, at *2; Ariz Sup Ct Jud Ethics Advisory Comm Op 15-01, 2015 WL 1530659, at *2; Neb Jud Ethics Comm Op 15-1; Penn Jud Conduct Bd Newsletter, at 18 (2014), *available at* http://judicialconductboardofpa.org/wp-content/uploads/JCB_Summer_2014_Newsletter.pdf.

Finally, Judge Day's procedural argument that he has not had adequate notice or an opportunity to defend against the violation of Rule 2.1(A) places form over substance. The conduct giving rise to a violation of Rule 2.1(A)—his refusal to treat same-sex couples equally—is substantially the same conduct giving rise to a violation of Rule 3.3(B)'s prohibition against bias. The two rules are intertwined: "Discriminatory behavior undermines public confidence in the integrity and impartiality of the judiciary." *In re Tabor*, 2013 WL 5853965, at *3. Judge Day's inability to negate the clear and convincing

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scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen * * *."

evidence of his manifested bias and prejudice is likewise fatal to his defense against the damage he has caused to judicial integrity and impartiality.[4]

II. Judge Day's Asserted Constitutional Defenses Are Meritless.

A. The Code's Prohibition Against Judge Day's Manifest Bias and Prejudice Does Not Trigger Heightened Scrutiny.

The Code's prohibition against Judge Day's judicial conduct manifesting bias and prejudice based on sexual orientation does not trigger heightened scrutiny under any of the constitutional defenses he asserts, whether based upon free speech, free exercise of religion, equal protection, or due process.

1. The Code Does Not Implicate Judge Day's Right to Free Speech, Particularly as a Government Employee.

Although the First Amendment protects both the right to speak as well as the right to refrain from speaking, *Wooley v. Maynard*, 430 US 705, 97 S Ct 1428, 51 L Ed 2d 752 (1977), strict scrutiny is not warranted here for three reasons: (1) prohibiting government discrimination based on sexual orientation regulates conduct rather than speech; (2) requiring a government official to treat same-sex and different-sex couples equally does not constitute inherently expressive conduct, and (3) even if such conduct constituted expression, it

[4] Furthermore, while the findings of the Commission are entitled to respect, they are reviewed *de novo* by this court, which possesses final adjudicative authority. Or Const, Art VII (Amended), § 8(1)(e); ORS 1.425(6). Judge Day has had ample opportunity to present his defense to this court.

would need to be analyzed under the First Amendment test governing public employee speech.

First, application of the Code to the circumstances here is properly understood as addressing conduct rather than speech. A judge's refusal to marry same-sex couples amounts to conduct—just as a county clerk's refusal to issue marriage licenses to same-sex couples also constitutes conduct. In *Miller v. Davis*, a county clerk refused to issue marriage licenses to same-sex couples on the grounds that the license contained a statement requiring her to "authorize" the marriage. 123 F Supp 3d 924, 931 (EDKY 2015). The court rejected the clerk's speech defense, noting that the license did not require that she "condone or endorse same-sex marriage on religious or moral grounds" but merely required her "to certify that the information provided is accurate and that the couple is qualified to marry under [state] law." *Id.* at 941. At bottom, both judicial officers and county clerks are government officials discharging a ministerial function to confer the status of marriage and its substantive rights and responsibilities on the marrying couple. *See* ORS 106.120 (placing judicial officers and county clerks on equal footing to perform marriages).

Notably, Oregon law specifies that in performing a marriage, "no particular form is required" except that the parties to the marriage assent that they take each other to be spouses in the presence of the officiant and witnesses.

ORS 106.150. Nothing prevents a county clerk or judge from repeating the same words when performing marriages for different-sex and same-sex couples. The official ensures "observance of * * * formalities." *Huard v. McTeigh*, 113 Or 279, 294, 232 P 658 (1925) (internal quotation marks omitted).

The mere fact that this governmental function of conferring the status, rights, and responsibilities of marriage on a couple may be discharged through words (e.g., "Do you take this person to be your spouse?") does not transform it into protected speech. Across a variety of contexts, "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 US 47, 62, 126 S Ct 1297, 164 L Ed 2d 156 (2006) (internal quotation marks omitted).

Protections against discrimination do not trigger strict First Amendment scrutiny merely because some discriminatory conduct happens to involve speech. "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Rumsfeld*, 547 US at 62. Similarly, a photography business cannot justify its

refusal to serve same-sex customers based on free speech, and any purportedly compelled speech from serving such customers is incidental to the regulation of conduct. *Elane Photography v. Willock*, 309 P3d 53, 65 (NM 2013).

This well-established proposition—that the mere presence of words is not sufficient to transform conduct into protected speech—has particular salience in the judicial context: virtually every exercise of judicial authority necessarily involves language of some sort. Such language is often a means to an end, whether that end is rendering judgment for a party or, here, conferring the status, rights, and responsibilities of marriage on a couple. That routine use of language stands in sharp contrast to situations where the government compelled speech solely because of the message it conveyed. *Id.* at 64-65.

Second, although inherently expressive conduct is also protected by the First Amendment in addition to pure speech, Judge Day cannot meet his burden of showing that a government official's compliance with a requirement to treat same-sex and different-sex couples equally constitutes inherently expressive conduct. In order for conduct to be inherently expressive, there must be both (1) an intent to communicate a specific message and (2) a significant likelihood that the message will be understood by those who view it. *Spence v. Washington*, 418 US 405, 410-11, 94 S Ct 2727, 41 L Ed 2d 842 (1974). Neither exists here.

Judge Day cannot credibly assert that he intended to send a message of approval (apart from confirming that the couple had satisfied the basic legal requirements for marriage) when exercising his statutory authority as a judicial officer to marry a couple. Indeed, as evidenced by his scheme directing court personnel to investigate whether a particular couple wishing to marry was of the same sex, he was generally ignorant of the identities and backgrounds of the couples. It therefore strains credibility to assert that he intended to send a message approving of whether any particular couple should be married or not.[5]

Furthermore, Judge Day cannot show that a government official's refusal to marry a particular couple communicates a message likely to be understood by those who witness it as reflecting the views of the government official. In *Rumsfeld*, law schools argued that if they treated military and nonmilitary recruiters alike as required by federal law, "they could be viewed as sending the message that they see nothing wrong with the military's policies," even though

[5] Judicial officers certainly cannot take the legal authority entrusted to them as public servants and instead use it for the intended purpose of sending a message of religious disapproval to one segment of the public. Indeed, doing so would have the purpose and effect of the government advancing religion, violating the Establishment Clause. *See Berry v. Dep't of Soc. Servs.*, 447 F3d 642, 650 (9th Cir 2006) (holding that a government employee had no right to communicate religious messages to client); *N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F2d 1145, 1151 (4th Cir 1991) (holding that a judge could not engage in prayer from the bench and observing that "[a] judge wearing a robe and speaking from the bench is obviously engaging in official conduct").

they opposed the military's then-existing policies that discriminated based on sexual orientation. 547 US at 64-65. But the Supreme Court rejected that compelled speech argument, because a reasonable observer would not attribute any views to the law schools; instead, a reasonable observer could appreciate that the law schools' conduct was simply required by law. *Id.* at 65.

Here, as well, Judge Day has not carried his burden of showing that a judicial officer or county clerk's exercise of statutory authority in marrying a couple is likely to be understood as reflecting a message that the official agrees with the marriage in any meaningful sense—as opposed to simply reflecting the official's compliance with nondiscrimination requirements. Based on similar reasoning, other courts have held that serving same-sex couples on equal terms as different-sex couples is not inherently expressive conduct. *See, e.g.*, *Arlene's Flowers*, 389 P3d at 556-60 (floristry); *Craig*, 370 P3d at 285-87 (bakery); *In the Matter of Klein*, Nos 44-14 & 45-14, 2015 WL 4868796, at *72 (Or Bureau of Labor and Indus July 2, 2015) (bakery); *Elane Photography*, 309 P3d at 47 (photography). By analogy, "providing flowers for a wedding between Muslims would not necessarily constitute an endorsement of Islam, nor would providing flowers for an atheist couple endorse atheism." *Arlene's Flowers*, 389 P3d at 557. A judicial officer or county clerk's exercise of legal authority

in marrying such couples is no different.[6]

Third, even if application of the Code here did regulate speech or expressive conduct, it would still have to be evaluated under the First Amendment analysis governing public employee speech. A public employee's speech is protected only if the employee speaks as a private citizen and the government lacks adequate justification for its regulation. *See Garcetti v. Ceballos*, 547 US 410, 421, 126 S Ct 1951, 164 L Ed 2d 689 (2006). This court has similarly recognized, under the Oregon Constitution, that the speech of judges is subject to a balancing test.[7] *See In re Schenck*, 318 Or at 430.

Here, Judge Day did not refuse to "speak" as a private citizen; he refused to exercise authority that he had only by virtue of his status as a public employee. *See Miller*, 123 F Supp 3d at 942 (holding that, even if a county clerk's refusal to issue a marriage license constituted speech, it would not be in her capacity as a private citizen); *ACLU of Ohio Found. v. DeWeese*, 633 F3d 424, 436 (6th Cir 2011) (holding that a judge had no right to hang a Ten

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[6] In contrast, clergy and religious denominations have a constitutional right to solemnize only those marriages that comport with their religious tenets. But that is a far cry from the performance of a marriage by a government official.

[7] Judge Day does not argue on appeal that the state constitution affords greater protection for his speech defense, and this court has held that the more general speech protections in Article I, Section 8 of the Oregon Constitution are subject to, and modified by, the more specific provisions governing judicial discipline. *See In re Fadeley*, 310 Or 548, 559, 802 P2d 31 (1990).

Commandments poster in his courtroom, because it constituted government speech); *Bauer v. Shepard*, 620 F3d 704, 718 (7th Cir 2010) ("The state, as employer, may control how its employees perform their work, even when that work includes speech (as a judge's job does)").[8] That alone ends the First Amendment inquiry. Furthermore, as discussed below, the government has an adequate—and, indeed, compelling—justification for application of the Code here: upholding judicial integrity and prohibiting bias.

2. Neither the Free Exercise of Religion Nor the "Hybrid Rights" Theory Can Shield Discriminatory Conduct.

Judge Day's free exercise defense relies in large part on his speech defense, but neither has merit. He argues that "the regulation of the free exercise of religion, when coupled with another constitutional right such as speech, is * * * subject to strict scrutiny." Day Br 138. Understandably, he does not assert a traditional free exercise defense: as he recognized below, "the

[8] The speech of judicial candidates, in contrast to sitting judges, implicates different First Amendment considerations, as they are not public employees. *See Wolfson v. Concannon*, 811 F3d 1176, 1190 (9th Cir 2016) (Berzon, J., concurring), *cert den*, __ US __, 137 S Ct 296 (2016). The Wyoming Supreme Court in *Neely* assumed that strict scrutiny should apply to the speech of a sitting judge, but it did so based on the parties' agreement, without explaining why judges are exempt from the traditional analysis governing public employee speech. *See* 390 P3d at 736. Moreover, the Wyoming court concluded that the judicial conduct rules survived strict scrutiny: "[a]llowing [a judge] to opt out of same-sex marriages is contrary to the compelling state interest in maintaining an independent and impartial judiciary." *Id.* at 740.

United States Supreme Court has held that generally applicable laws that incidentally burden the free exercise of religion are constitutional," and there is no dispute that the Code constitutes a neutral set of rules of general applicability. ER 286 (citing *Employment Div. v. Smith*, 494 US 872, 110 S Ct 1595, 108 L Ed 2d 876 (1990)). Instead, he relies on the so-called "hybrid rights" theory, which posits that a free exercise claim may be joined with another constitutional claim to require heightened scrutiny, even if neither claim would succeed standing alone.

For good reason, the hybrid rights theory has gained little acceptance among courts, including in Oregon. If the mere inclusion of another constitutional claim requires heightened scrutiny, that would swallow the rule that free exercise claims do not ordinarily require such scrutiny; if heightened scrutiny applies only when the other claim is successful, then the free exercise argument is superfluous. *See Church at 295 S. 18th St., St. Helens v. Employment Dep't*, 175 Or App 114, 127-28, 28 P3d 1185 (2001). The Ninth Circuit has also recognized that the hybrid rights theory has been "widely criticized." *Jacobs v. Clark Cty. Sch. Dist.*, 526 F3d 419, 440 n45 (9th Cir 2008) ("The 'hybrid rights' doctrine has been widely criticized, and, notably, no court has ever allowed a plaintiff to bootstrap a free exercise claim in this manner. We decline to be the first.") (citations omitted); *see also Craig*, 370

P3d at 292 (noting that the hybrid rights theory has been "criticized as illogical, and dismissed as untenable"). In any event, because Judge Day's speech defense is meritless, it adds nothing to his free exercise defense.

When the Supreme Court held that same-sex couples had a fundamental right to marry, it recognized that there were some with strong religious objections to allowing same-sex couples to marry—but it also recognized that those objections did not permit the government to interfere with the exercise of that right. *Obergefell*, 135 S Ct at 2607. Here, as well, Judge Day may not base official conduct he undertakes as a judge on his religious beliefs, much less impede the exercise of a fundamental right.

3. At Most, Only Rational Basis Review Is Warranted Under the Equal Protection and Due Process Clauses.

Equal Protection. Judge Day asserts that his equal protection rights have been violated because other judges supposedly "can choose not to perform weddings without adverse consequence on their judicial status." Day Br 135. That is not true. All judges—including Judge Day—may decline to perform marriages for non-discriminatory reasons; no judge may decline to perform marriages for discriminatory reasons. For example, all judges may decline to perform marriages because they have a scheduling conflict, but no judge may decline to perform a marriage because of the race of the parties to the

marriage—regardless of whether that refusal arises from a religious objection. The Code applies evenhandedly to all judges.[9] Because there has been no differential treatment at all, Judge Day's equal protection argument fails at the outset.

Judge Day also argues that he has been treated differently than judges who can recuse themselves from deciding cases on "disputed social issues," but he is not similarly situated to such judges. ER 291. In a typical recusal situation, a judge who recuses can no longer rule for one side or the other. Here, however, Judge Day chose to *remain* in the business of performing marriages but selectively removed himself from marriages involving only same-sex couples. That selectivity is the very antithesis of the neutrality that recusal attempts to preserve.

Even if Judge Day could articulate how he has been treated differently than a similarly situated judge, he has not identified differential treatment based on a characteristic that would warrant heightened scrutiny. Accordingly, he must show that there is no rational basis for the Code's application, which he cannot do. *See* Section II.B.

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[9] Judge Day's assertion that he has been subjected to a "religious test" fails for the same reason. *See Neely*, 390 P3d at 743. A judge "may hold her religious beliefs, and she must impartially apply the law regardless of those beliefs." *Id.* at 738.

Due Process. Judge Day asserts that the Commission's enforcement of the Code violates his substantive due process rights because it is based on the "voluntary" act of performing marriages (which, contrary to his assertion, necessarily constituted judicial conduct because his authority to perform marriages derived from his status as a judge, as discussed above). Because Judge Day has not demonstrated the violation of a fundamental right, or any liberty interest even approaching such a right, the question is whether there is a rational basis for enforcing the Code's proscriptions.

There is nothing arbitrary about prohibiting judicial conduct that manifests bias or undermines judicial integrity, without regard to whether the activity in question is discretionary in nature. Judges have discretion whether to grant extensions to parties, but they cannot follow a policy of granting extensions only to parties who are co-religionists. Judges also have discretion whether to engage law student externs, but they cannot refuse to engage externs based on their race or religion. A judge's discretion is not unbridled; it is still subject to Code's prohibition against bias and protection of integrity.

Here, the fact that Judge Day was not required to perform marriages does not erase the harm that his discriminatory conduct inflicted upon the judiciary, the individuals whom it serves, and the interests protected by the Code. Indeed, as the Wyoming Supreme Court recognized in *Neely*, the position advanced by

Judge Day is essentially "an argument that bias or prejudice is acceptable if the judicial function is discretionary." 390 P3d at 749. But "[o]ur society requires a fair and impartial judiciary no matter how the judicial function is classified." *Id.*

B. The Code Is Narrowly Tailored to Oregon's Compelling Interests in Eliminating Discrimination and Preserving Judicial Integrity and Impartiality.

Because application of the Code here is narrowly tailored to serve compelling state interests in nondiscrimination and judicial integrity, it passes *any* level of scrutiny.

1. Oregon Has a Compelling Interest in Prohibiting Sexual Orientation Discrimination, Particularly By the Government Itself.

Enforcing the Code here serves a compelling state interest in ensuring that all individuals and society itself are spared from the high cost of discrimination, including where it is based on sexual orientation. This state interest in nondiscrimination is at its zenith where the discrimination at issue is by the government's own hands.

The government has a compelling interest in eliminating invidious discrimination in all its forms. *EEOC v. Mississippi Coll.*, 626 F2d 477, 488 (5th Cir 1980). For example, the U.S. Supreme Court has repeatedly held that a state law barring discrimination in public accommodations "plainly serves

compelling state interests of the highest order" because of the personal and societal toll exacted by such discrimination. *Roberts v. U.S. Jaycees*, 468 US 609, 624, 104 S Ct 3244, 82 L Ed 2d 462 (1984); *accord N.Y. State Club Ass'n v. City of New York*, 487 US 1, 14 n.5, 108 S Ct 2225, 101 L Ed 2d 1 (1988); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 US 537, 549, 107 S Ct 1940, 95 L Ed 2d 474 (1987). This toll includes "the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public." *Heart of Atlanta Motel v. United States*, 379 US 241, 291-92, 85 S Ct 348, 13 L Ed 2d 258 (1964) (Goldberg, J., concurring, citations omitted); *see also Swanner v. Anchorage Equal Rights Comm'n*, 874 P2d 274, 282-83 (Alaska 1994). Discrimination also "denies society the benefits of wide participation in political, economic, and cultural life," *Roberts*, 468 US at 625, and instead causes social strife and balkanization, where doors are open to some but not to others.

Oregon has similarly recognized that a "chief harm resulting from the practice of discrimination by establishments serving the general public is not * * * the inconvenience of limited access but, rather, the greater evil of unequal treatment, which is the injury to an individual's sense of self-worth and personal integrity.'" *King v. Greyhound Lines*, 61 Or App 197, 203, 656 P2d 349 (1982); *see also Cortez v. State*, 121 Or App 602, 605, 855 P2d 1154 (1993). This

dignitary harm is often accompanied by negative psychological and health consequences.[10]

A clear chorus of courts has come to the same conclusion: there is a compelling government interest in eliminating discrimination on the basis of sexual orientation. *See, e.g.*, *Arlene's Flowers*, 389 P3d at 565-66 (Washington); *Gifford*, 23 NYS3d at 431 (New York); *Craig*, 370 P3d at 293 (Colorado); *Benitez*, 189 P3d at 969 (2008) (California); *Gay Rights Coal. of Georgetown Univ. Law Center v. Georgetown Univ.*, 536 A2d 1, 38 (DC 1987) (District of Columbia); *accord In the Matter of Klein*, 2015 WL 4868796, at *62.[11]

This interest in nondiscrimination has at least equal, if not greater, force when the entity engaging in discrimination is the government itself. In Oregon, for example, a place of public accommodation includes not merely commercial businesses but also "[a]ny service to the public that is provided by a public body * * * regardless of whether the service is commercial in nature." ORS 659A.400(1)(c); *accord* 659A.400(1)(b). Public servants who close their doors

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[10] U.S. Dep't of Health & Human Servs., *Healthy People 2020*, Lesbian, Gay, Bisexual, and Transgender Health, https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health.

[11] Lambda Legal filed an amicus brief in the *Klein* appeal detailing examples of Oregon's own long and painful history of sexual orientation discrimination. *See* http://www.lambdalegal.org/sites/default/files/klein_or_20160829_amicus.pdf.

to a class of individuals do unique damage to democracy: the public loses faith in the promise that their government is of the people, by the people, and for the people.

Indeed, because much of the discrimination against lesbian and gay people has historically been perpetrated by the government itself, the government has a unique obligation and ability to redress the harm to which it has contributed. The U.S. Supreme Court has recounted some of the extensive history of government discrimination against lesbian and gay people in America, including their prohibition from most government employment, their bar from military service, their exclusion under immigration laws, and their targeting by police. *Obergefell*, 135 S Ct at 2596. In barring lesbian and gay people from marriage, the government treated their families as "somehow lesser," causing "stigma" and "humiliat[ion]" of constitutional magnitude and "diminish[ing] their personhood." *Id.* at 2590, 2602. Lesbian and gay people "are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world." *Baskin v. Bogan*, 766 F3d 648, 658 (7th Cir 2014). Of course, the history of discrimination that lesbian and gay people face is far from over; it continues to this day. These realities support the paramount interests in barring anti-gay discrimination.

It is also instructive that, under both the federal and state constitution,

government discrimination on the basis of sexual orientation requires heightened scrutiny. *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F3d 471, 484 (9th Cir 2014) (requiring heightened scrutiny for differential treatment based on sexual orientation); *Tanner v. Oregon Health Sci. Univ.*, 157 Or App 502, 524, 971 P2d 435 (1998) (holding that lesbian and gay people constitute a suspect class under the state privileges and immunities clause because "it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice"). To be clear, the government can have a compelling interest in eliminating discrimination against a group even if the group is not a suspect class. *See, e.g.*, *Swanner*, 874 P2d at 283. But the fact that lesbians and gay men do constitute such a class reinforces that the government has a powerful interest in protecting the class from harm—including at the government's own hands.

Application of the Code is also narrowly tailored to further the government's nondiscrimination interest. Prohibiting discrimination "'responds precisely to the substantive problem which legitimately concerns' the State." *Roberts*, 468 US at 629. Conversely, the state's interest "will clearly suffer" if judges may exempt themselves based on religious or other disagreement with its compliance. *Swanner*, 874 P2d at 283.

None of Judge Day's arguments refute the presence of narrow tailoring.

First, Judge Day asserts that he never "actually" discriminated against a same-sex couple, despite formulating and implementing a scheme to screen out same-sex couples and even turning away a suspected same-sex couple. Day Br 4. Even if that was true, however, the enforcement of nondiscrimination requirements serves both a remedial and prophylactic function. Surely this court need not wait until a member of the public suffers the humiliating sting of being turned away before the court may hold a judicial officer responsible for wrongdoing.[12] A judicial officer also cannot avoid this harm by misrepresenting the reason for turning a same-sex couple away—as Judge Day instructed his staff to do—because that would, in turn, violate Rule 2.1(D)'s prohibition against dishonest conduct.

Second, Judge Day asserts that his refusal to perform marriages for same-sex couples does not affect his ability to be impartial or administer justice without favor. Day Br 140. That eludes the obvious point that he was not impartial as a judicial officer with respect to performing marriages: he served different-sex couples but refused to serve same-sex couples. Whether or not Judge Day could rule fairly for a lesbian in a tort case or some other matter—

[12] For that same reason, Judge Day's assertion that his practice of serving only different-sex couples is entitled to an "accommodation" under Title VII has no merit. Day Br 142. That would impose an undue burden on the government by violating the Equal Protection Clause and inflicting harm on third parties.

and the public could reasonably doubt that he could—does not in any way address the judicial misconduct at issue here.

Finally, crediting Judge Day's contention that a refusal to provide equal services to same-sex couples causes no harm because couples can locate another government official willing to perform a marriage would sanction what Oregon courts have recognized as a "chief harm" of discrimination: "the injury to an individual's sense of self-worth and personal integrity." *King*, 61 Or App at 202. The goal of preventing that harm would be "fatally undermined" if this court were "to carve out a patchwork of exceptions" from nondiscrimination protections. *Arlene's Flowers*, 389 P3d at 566.

2. Enforcement of the Code Advances Oregon's Compelling Interest in Judicial Integrity and Impartiality.

The integrity of our judicial system is crucial to upholding the rule of law. As the U.S. Supreme Court recently emphasized, states have a "compelling interest in judicial integrity." *Williams-Yulee v. Fla. Bar*, __ US __, 135 S Ct 1656, 1668, 191 L Ed 2d 570 (2015). Judicial integrity is "a state interest of the highest order" because "[t]he citizen's respect for judgments depends in turn upon the issuing court's absolute probity." *Republican Party of Minn. v. White*, 536 US 765, 793, 122 S Ct 2528, 153 L Ed 2d 694 (2002) ("*White*") (Kennedy, J., concurring). To be fair and impartial, judges must

apply the law without bias or favor towards particular parties or classes of people. *See, e.g., Caperton*, 556 US at 876 ("a fair tribunal is a basic concept of due process") (internal quotation marks omitted).

In addition, in order to maintain public confidence in our judicial system, it is essential that "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 US 11, 14, 75 S Ct 11, 99 L Ed 11 (1954). Maintaining public confidence in the judiciary is so compelling that it has been deemed essential to due process. *See, e.g., Mayberry v. Pennsylvania*, 400 US 455, 469, 91 S Ct 499, 27 L Ed 2d 532 (1971) (Harlan, J., concurring) ("the appearance of evenhanded justice * * * is at the core of due process").

Oregon protects the integrity of its judiciary by adopting rules to maintain actual and perceived judicial fairness based on the Model Code of Judicial Conduct. To comply with their oaths, Oregon judges have a duty to administer the law impartially. ORS 1.212(2). This court has recognized the "profound" importance of the reality and appearance of judicial integrity. *See Fadeley*, 310 Or at 563 ("A democratic society that, like ours, leaves many of its final decisions, both constitutional and otherwise, to its judiciary is totally dependent on the scrupulous integrity of that judiciary."). Rules 2.1(A) and 3.3(B) of the Code advance Oregon's compelling government interest in preserving judicial integrity by prohibiting conduct that threatens the reality and

appearance of impartiality and protecting the due process rights of those who come before the judiciary.

Many LGBT people and same-sex couples who encounter bias and discriminatory treatment seek access to justice in the courts. More than ten thousand same-sex couples live in Oregon.[13] Many of these couples are already married, but many others will certainly marry in the future, and some will seek to have their marriages performed by Oregon judges. In these contexts and others, LGBT people and same-sex couples must trust implicitly that the judges who serve them will administer the law fairly and impartially.

Unfortunately, as jurors, lawyers, and parties, LGBT people face both overt and subtle discrimination. In a recent national survey of LGBT people, respondents reported experiencing a range of negative courthouse encounters, ranging from overhearing negative comments about sexual orientation to having their own sexual orientation disclosed in court against their will.[14] A study by the Judicial Council of California revealed that 50 percent of lesbian and gay

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[13] *See* Gary J. Gates & Abigail M. Cooke, *United States – Census Snapshot 2010*, at 3-4 (2011), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf.

[14] Lambda Legal, *Protected and Served? A National Survey Exploring Discrimination by Police, Prisons and Schools Against LGBT People and People Living with HIV in the United States* (2014), *available at* http://www.lambdalegal.org/protected-and-served.

court users believed that the courts are not providing fair and unbiased treatment for lesbians or gay men.[15]

Enforcement of judicial conduct rules is an essential bulwark against erosion of public confidence in the judiciary. As the Wyoming Supreme Court has also recognized, enforcement of judicial conduct rules to bar a judge from refusing to marry only same-sex couples serves a compelling government interest in judicial integrity. *Neely*, 390 P3d at 736. That court recognized that judges may disagree with some aspects of the law for religious or personal reasons; nonetheless, "the judiciary plays a key role in preserving the principles of justice and the rule of law, which requires the consistent application of the law regardless of the judge's personal views." *Id.* at 738.

Judge Day's misguided reliance on *White* for the proposition that Oregon has no compelling interest in ensuring that judges treat same-sex couples equally is untenable. In *White*, the U.S. Supreme Court struck down a rule prohibiting judicial candidates from announcing their positions on particular issues. 536 US at 768. The Court made clear that the challenged rule did not promote the interest in judicial integrity because it "does not restrict speech for

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[15] Judicial Council of the State of Cal., *Sexual Orientation Fairness in the California Courts: Final Report of the Sexual Orientation Fairness Subcommittee of the Judicial Council's Access and Fairness Advisory Committee* (2001) at 13, *available at* http://www.courts.ca.gov/documents/sexualorient_report.pdf.

or against *particular parties*, but rather speech for or against *particular issues*." *Id.* at 776 (emphasis added). Nevertheless, the Court went on to underscore that impartiality necessarily depends on a lack of bias for or against a party to assure equal application of the law. *Id.* at 775-76.

Here, Judge Day's refusal to perform marriages for same-sex couples on equal terms as for different-sex couples demonstrates an unwillingness to administer the law equally with respect to particular classes of people. Preventing this bias and unequal application of the law cuts to the very core of the interest in judicial integrity articulated by the Court in *White*.

The Code is also narrowly tailored to achieving the government's interest in judicial integrity and impartiality. Notably, even under strict scrutiny, the Code need not be "perfectly tailored." *Williams-Yulee*, 135 S Ct at 1671 (recognizing the "impossibility of perfect tailoring" especially where "the State's compelling interest is as intangible as public confidence in the integrity of the judiciary"). The Code requires Judge Day to perform duties impartially at all times, including discretionary judicial functions. Rules 2.1(A) and 3.3(B) of the Code take aim at conduct that undermines judicial integrity and impartiality by requiring equal application of the law free of bias.[16] These rules

[16] Judge Day also asserts that the rules are void for vagueness, but any ordinary judge would discern that rules of judicial conduct prohibit discriminating

apply evenhandedly to all judges. There is no less restrictive means for advancing Oregon's compelling state interest in judicial integrity and impartiality.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that this court adopt the Commission's conclusion that Judge Day's violated the Code in refusing to serve same-sex and different-sex couples equally.

Dated: May 2, 2017

Respectfully submitted,

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against one class of people in the exercise of judicial powers. *See Neely*, 390 P3d at 746 (collecting cases rejecting similar vagueness challenges). Indeed, Judge Day's own efforts to conceal his discriminatory scheme—from surreptitiously running background checks to misrepresenting his availability—illustrate that he understood all too well that his conduct was out of bounds.

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that this brief complies with the word count-limitation in ORAP 5.05(1)(b) and is 8,201 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f)

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CERTIFICATE OF FILING AND SERVICE

I certify that I filed this brief with the Supreme Court Administrator, Appellate Court Records Section.

I certify that service of a copy of this brief will be accomplished on the following participant(s) in this case, who is a registered user of the appellate courts' eFiling system, by the appellate courts' eFiling system at the participant's email address as recorded this date in the appellate eFiling system: Timothy R. Volpert, Victoria D. Blachly, and Darlene D. Pasieczny, attorneys for the Commission on Judicial Fitness and Disability; and Janet Schroer, attorney for Hon. Vance D. Day.

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